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No. 90-439

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES BIAS, as personal representative
of the Estate of LEONARD KEVIN BIAS, Deceased,
Petitioner,

v.

ADVANTAGE INTERNATIONAL, INC. and A. LEE FENTRESS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

PATRICK W. LEE *
JOHN A. MACLEOD
CLIFTON S. ELGARTEN
LUTHER ZEIGLER
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2500

* *Counsel of Record for Respondents*

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STATEMENT

The opinion below (Pet. App. 1-24) fairly sets forth the facts necessary to the disposition of this Petition.[1]

REASONS FOR DENYING THE WRIT

The Petition raises neither an important federal question nor an issue upon which the courts of appeals are divided. Applying summary judgment principles clearly articulated by the Court in its 1986 trilogy of summary

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[1] Pursuant to this Court's Rule 29.1, Respondent Advantage International, Inc. ("Advantage") states that it is a privately held corporation, with no parent or subsidiary companies (other than wholly owned subsidiaries).

judgment decisions,[2] the courts below addressed each of Petitioner's various state-law claims and found them without factual support sufficient to warrant their presentation to a jury. Notwithstanding Petitioner's suggestion that the summary judgment principles so recently enunciated by the Court are fraught with "ambiguity" (Pet. 19), and have "exacerbated, not relieved" summary judgment procedure (*id.* 18), the lower courts have, in fact, had little difficulty applying these standards. Certainly, the courts below had no problem applying these standards to the record here. Accordingly, the Petition should be denied.

A. Leonard K. Bias, a prominent basketball player at the University of Maryland, died in the early morning hours of June 19, 1986, after ingesting approximately one-third of a cup of cocaine. Mr. Bias had been celebrating with friends and teammates his recent selection by the Boston Celtics in the 1986 National Basketball Association draft. Approximately nine weeks before his death, Mr. Bias had entered into a representation agreement with Respondent Advantage for the purpose of managing his upcoming professional basketball career.

After Mr. Bias' death, his Estate (Petitioner here) brought this action seeking money damages from Respondents arising out of Respondents' alleged failure (1) to have obtained a life insurance policy for Mr. Bias before his death from cocaine intoxication,[3] and (2) to

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[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[3] Advantage in fact obtained a $1 million disability policy, with an accidental death rider, from Fidelity Security Life Insurance Company. (Pet. App. 5-6.) The Estate sued Fidelity when Fidelity refused to pay under the policy; the district court granted summary judgment to Fidelity because of the policy provision excluding recovery for a "drug related" death. (Pet. App. 5 n.1.) No appeal was taken from that judgment.

finalize and sign a possible multi-year endorsement contract with Reebok International, Ltd. ("Reebok") that Respondents had begun negotiating on Mr. Bias' behalf the afternoon before he died. The Estate claimed damages measured by the insurance proceeds that it would have received had such life insurance been obtained and the proceeds of what it says would have been "guaranteed compensation" under the endorsement contract that might eventually have been finalized and signed had Mr. Bias lived.

The district court granted Advantage summary judgment on the first claim on the basis of (1) uncontradicted eyewitness testimony from Mr. Bias' former friends and teammates that Mr. Bias had an extensive history of prior cocaine use, culminating in his death by self-induced cocaine intoxication (Pet. App. 29-31), and (2) undisputed expert testimony that, even if Advantage were under a duty to try to procure life insurance on Mr. Bias' behalf, this history of drug use would have rendered him uninsurable because *all* insurance companies that issue substantial term life policies inquire into such use at some point in the application process. (Pet. App. 25-29.) Petitioner did not offer any evidence to contradict Advantage's showing that Mr. Bias had, in fact, used cocaine on the numerous particular occasions cited by his teammates.[4] (Pet. App. 14-15.) Moreover, the Estate was unable to rebut Advantage's showing that Mr. Bias was uninsurable by identifying even a single insurance company that would have issued the alleged $1 million term life policy given his history of cocaine use. (Pet. App. 19-21.) Under the circumstances, both courts below held that the Estate had failed to meet Rule 56(e)'s require-

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[4] Instead, the Estate relied on generalized affidavit testimony from Mr. Bias' parents and former coach that *they* were unaware that Mr. Bias used cocaine, and on a handful of unauthenticated and unverified drug tests suggesting, at most, that on certain given days preceding the NBA draft, Mr. Bias was not under the influence of cocaine. (Pet. App. 15-16.)

ment that the nonmoving party come forward with "specific facts showing that there is a genuine issue for trial."

As to the second claim, Advantage was granted summary judgment by virtue of the admissions of the Estate's own witnesses and of Reebok officials that it would have been impossible to negotiate, finalize, and execute an endorsement agreement prior to Mr. Bias' death (even making the improbable assumptions that Respondents would have been under a duty to do so and that this contract would have contained a clause guaranteeing Mr. Bias payment even if he died the next morning). (Pet. App. 22-23.) Petitioner did not challenge these admissions or this testimony, and offered no evidentiary basis for its claim that a Reebok contract could have been negotiated, consummated, and signed overnight—*i.e.*, before Mr. Bias' unexpected death the next morning. (Pet. App. 23.) Accordingly, the lower courts likewise held that there was no genuine issue for trial as to the Reebok contract claim.[5]

B. The only federal question sought to be raised by the Petition concerns the lower courts' application of Rule 56 standards. The lower courts' judgment, however, rests on an entirely straightforward application of summary judgment principles articulated by this Court.

1. Petitioner's principal argument is that it is inappropriate to grant summary judgment where the moving party's motion depends upon the statements of witnesses who might not be believed were the case submitted to a jury. Thus, citing *Poller v. Columbia Broadcasting Systems*, 368 U.S. 464 (1962) and certain other older cases, the Estate argues that the courts below improperly awarded Respondents summary judgment given the pos-

[5] Respondents respectfully submit that the arguments raised by the Petition concerning the Reebok contract claim (*see* Pet. 44-48) are so plainly lacking in merit as not to require a response.

sibility that a jury may have chosen to disregard the corroborated eyewitness testimony of Mr. Bias' former teammates as to his prior cocaine use. (Pet. 24-34.) Such a possibility, Petitioner contends, is in and of itself sufficient to create a triable issue under Rule 56.

This amounts to nothing more than the assertion that summary judgment can never be granted where facts are to be proven by testimony because a jury might elect to disbelieve all of the evidence favoring the moving party, even though there is nothing to contradict it. In this case, of course, the testimony of the eyewitnesses who saw Mr. Bias ingest cocaine on numerous occasions—which testimony Petitioner would apparently ask the Court to disregard and the jury to disbelieve—is corroborated by the uncontested physical fact that Mr. Bias died from ingesting cocaine.

In any event, this Court rejected an argument identical to that advanced by Petitioner in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). In that case, the Court specifically held that *Poller* does not mean that "a plaintiff may defeat a defendant's properly supported motion for summary judgment . . . without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's [witnesses]." Noting that "discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion," the Court in *Anderson* reiterated that "the plaintiff must present *affirmative* evidence in order to defeat a properly supported motion for summary judgment." *Id.* (emphasis added), quoting *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 512 (1984). The court of appeals faithfully followed *Anderson* in rejecting this same argument below.[6]

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[6] Petitioner's reliance on *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620 (1944) (Pet. 24-29) is likewise misplaced. In *Sartor*, the

2. Alternatively, the Estate asserts that the generalized affidavit testimony from Mr. Bias' parents and his former coach that *they* personally were not aware of his cocaine use creates the necessary triable issue of fact. Citing a dissenting opinion in *Anderson* (Pet. 34), Petitioner contends that, by requiring it to come forward with specific evidence tending to contradict the specific eyewitness testimony of Mr. Bias' prior cocaine use, the lower courts held the Estate to the unfair burden of "proving a negative."

This is not what the lower courts held. They held that Petitioner must offer evidence sufficiently probative of the facts in question to create an issue for trial. Here, the evidence that Bias died of cocaine intoxication, along with the testimony that he used cocaine previously by persons who witnessed that use on numerous public occasions, showed that Mr. Bias was a cocaine user. Generalized assertions by certain individuals that they were unaware of these facts did not create a triable issue upon which a jury could properly decide that Mr. Bias was not a cocaine user.

As the Court reaffirmed just last Term, to defeat a properly supported summary judgment motion, the nonmovant must "set forth *specific* facts showing that there is a genuine issue for trial." *Lujan v. Nat'l Wildlife Fed'n*, 110 S. Ct. 3177, 3188 (1990) (emphasis added), quoting Fed. R. Civ. P. 56(e). As the Court in *Lujan* explained:

Court held merely that summary judgment was inappropriate for damages issues at a time when Rule 56(c) expressly excepted damages questions from summary judgment procedures. 321 U.S. at 624 ("Where the undisputed facts leave the existence of a cause of action depending on questions of damages which the rule has reserved from the summary judgment process, it is doubtful whether summary judgment is warranted on any showing.") The Rule was amended two years later to clarify that summary judgment should apply to damages issues like any others. *See* Notes of Advisory Committee to the 1946 Amendment to Fed. R. Civ. P. 56(c).

> In ruling upon a Rule 56 motion, 'a District Court must resolve any factual issues of controversy in favor of the non-moving party' *only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant*, the motion must be denied. That is a world apart from 'assuming' that general averments embrace the 'specific facts' needed to sustain the complaint. . . . The object of this exercise is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.

Id. (emphasis added). The court of appeals' conclusion that "the Estate's generalized evidence that Bias was not a drug user did not contradict the more specific testimony of teammates who knew Bias well and had seen him use cocaine on particular occasions" (Pet. App. 14) was a simple application of this well-settled rule.[7]

C. Finally, many of the arguments raised by the Petition depend upon belated assertions of fact which Petitioner concedes (Pet. 9 n.2) were *not* presented to the district court. Thus, in an effort to shore up some of the defects in its case noted by the court below (*see* Pet. 35 n.8 & note 7 *supra*), the Estate has appended to the Petition what it claims are excerpts from trial testimony given by some of Mr. Bias' teammates in a related crimi-

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[7] Nor was the Estate thereby required to "prove a negative," as the Petition suggests. In order to rebut the evidence of Mr. Bias' prior cocaine use, the Estate merely had to offer some evidence tending to show that Mr. Bias did *not*, in fact, use cocaine on some or all of the particular occasions testified to by his teammates. As the court of appeals explained:

> The Estate could have deposed Long and Gregg, or otherwise attempted to impeach their testimony. The Estate also could have offered the testimony of other friends or teammates of Bias who were present at some of the gatherings described by Long and Gregg, who went out with Bias frequently, or who were otherwise familiar with his social habits. The Estate did none of these things.

(Pet. App. 16.)

nal proceeding, although none of these materials were offered or considered by either court below. Petitioner's attempt to create factual issues in dispute by presenting evidence for the first time in this Court is plainly improper. Thus, even were the questions presented by the Petition worthy of review, it would be improvident for the Court to grant certiorari on questions that rest on extra-record assertions that were neither presented to, nor passed upon by, the district court. *See Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980).

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition should be denied.

Respectfully submitted,

PATRICK W. LEE *
JOHN A. MACLEOD
CLIFTON S. ELGARTEN
LUTHER ZEIGLER

CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2500

* *Counsel of Record for Respondents*

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